



Lamoine Board of Appeals

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Minutes of May 10, 2011

Chair Hancock “Griff” Fenton called the meeting to order at 7:30 PM

Present were: Appeals Board members John Wuorinen, Griff Fenton, Merle Bragdon, Jay Fowler, James Crotteau, Jon VanAmringe; Secretary Stu Marckoon, Planning Board Chair John Holt, Planning Board member Chris Tadema-Wielandt and Laurence Lovett.

Minutes of April 27 & 28, 2011 – The board spent considerable time reviewing the minutes. Mr. Crotteau moved to approve the minutes as prepared. Mr. Bragdon 2nd. **Vote in favor was 5-0.**

Vice Chair Appointment – After a brief discussion as to whether any board member was designated as the vice chair, Mr. Wuorinen moved to name Mr. Crotteau as vice chair, Mr. Bragdon 2nd. **Vote in favor was 4-0.** Mr. Fenton then yielded the chair to Mr. Crotteau.

Request to change vote re: Gott v. Planning Board – Mr. Crotteau said the primary reason for the meeting was a request from Mr. Fenton to change his vote cast at the prior meeting in regard to Site Plan Review Permit criterion J 16. Mr. Fenton explained his thought process immediately following the meeting, and said he immediately called Secretary Marckoon that evening and followed up with the e-mailed request the next morning. **He moved to reconsider the vote in regard to section J and J-16 of the Site Plan Review Ordinance.** Mr. Bragdon 2nd.

Mr. Fenton said at the last meeting the Board voted on the standard J 16 and read the section. He said he stated that the Planning Board had no choice but to use this standard. He said he voted that this would apply, but on his way home, he recalled reading a passage that refuted that. He read the introductory paragraph to section J of the Site Plan Review Ordinance:

The following criteria and standards shall be utilized by the board in reviewing applications for site plan review approval. The standards are not intended to discourage creativity, invention and innovation. The board may waive the criteria presented in this section upon a determination by the board that the criteria are not applicable to the proposed action or upon a determination by the board that the application of these criteria are not necessary to carry out the intent of this ordinance. The board shall approve the application unless the proposal does not meet the intent of one or more of the following criteria provided that the criteria were not first waived by the board.

Mr. Fenton said the last sentence plainly states the board’s option to waive criteria. He said even if one could determine the comprehensive plan applied to the ordinance, a number of questions arise. He asked which section of the Comprehensive Plan would apply. He read an introduction paragraph:

Lamoine is a small coastal community, a bedroom town with a conspicuous retirement component, at the head of Frenchman Bay in Hancock County. It is almost exclusively residential. Industrial activity is minor and consists primarily of gravel extraction and some small, marine-related activities.

Mr. Fenton asked which parts of the Comprehensive Plan are the criteria. He said the criteria should be in the form of an ordinance or zoning provisions passed by the town. He said the Comprehensive Plan was a document that contained recommendations from the town. He read from section 10 of the Comprehensive Plan:

POLICIES AND POLICY IMPLEMENTATION RECOMMENDATIONS OF THE COMMITTEE

1. ORDERLY GROWTH AND DEVELOPMENT

The town shall adopt and periodically update an official land use map which designates areas suitable for growth and development, areas where the rural and agricultural characteristics of the community shall be preserved and enhanced, residential areas which shall be protected from strip development, areas which shall provide the community with marine access, and areas which shall provide protection for the town's natural resources.

The committee recommends the following Land Use Plan (as shown in the accompanying map):

Mr. Fenton said this does not specify any other use than that of a recommendation. He said to use the Comprehensive Plan as a review criterion is an error. He said even if the standard had to be used, and he contended it did not, it would not pass the test that this application violated any part of the plan. He said he requested the reconsideration vote in light of this information.

Mr. Crotteau said his suggestion is to revote on this issue. Mr. Wuorinen said he recalled that the town attorney had advised the use of the Comprehensive Plan standard was found by the court to be appropriate in one case where the ordinance was written in a similar manner to Lamoine's. He said it seems like the Appeals Board was on the right track.

Mr. Fenton said he believed the Planning Board erred and should have waived that provision of the Comprehensive Plan. He said there were 3 or 4 cases that deal with Comprehensive Plans, and he honestly believed he made an error in his vote.

Planning Board chair John Holt said he never said that the Planning Board was compelled to use section J-16 because his testimony was misrepresented. He said the Board did so by choice, not under duress, and there has to be some indication why that was an administrative error.

Mr. Crotteau said as a general matter, if one has second thoughts about an action; the appropriate way to deal with it is to do what Mr. Fenton did. He said at least for this part of the agenda, he believes Mr. Fenton should be allowed to change his vote. He said he cannot see why Mr. Fenton should not be allowed to do that.

Mr. Crotteau said he does not believe the Appeals Board has the ability to waive standards of the Site Plan Review Ordinance, only the Planning Board can do that. He said the only way to change that is if a glaring error was made, and he doesn't believe that happened.

Vote in favor of the motion to reconsider was 5-0.

Secretary Marckoon said that now reopens the vote in Site Plan Review Ordinance criterion J-16. The motion from the meeting of April 28 reads as follows: *Mr. Crotteau moved to affirm the decision of the Planning Board in regard to section J16 of the Site Plan Review Ordinance. Mr. Wuorinen 2nd.* **Vote was 2-3 (Fenton, Bragdon and Fowler opposed).**

Mr. Fenton moved to remand the decision on Section J-16 of the Site Plan Review Ordinance to the Planning Board. Mr. Fowler 2nd.

Mr. Fenton said he's read his statement in regard to this criterion. Mr. Crotteau said it appears Mr. Fenton is saying the reason to remand is that the Planning Board did not consider waiving this criterion. Mr. Fenton said that was one of his main objections, and that the Planning Board has the ability to waive, and the situation warranted waiver of J-16. Mr. Fowler said the Comprehensive Plan is too vague, and it seems to more of an issue of personal preference than an ordinance. He said nobody could meet the Comprehensive Plan.

Mr. Holt noted that the Planning Board has never waived this criterion in the past. An exchange followed between Mr. Holt and several Board of Appeals members in regard to the Planning Board always finding applications in compliance with the Comprehensive Plan.

Mr. Fenton said he agreed that each case is a single matter. He asked if the Planning Board lists each section of the Comprehensive Plan for compliance. He said he also disagreed that gravel is a minor industrial activity. He said it's hard to comply with both issues identified in the Comprehensive Plan.

Mr. Holt said the town voted in the Comprehensive Plan and the Site Plan Review Ordinance. Mr. Fenton said he agreed that the Comprehensive Plan standards are vague, and when the Planning Board has the ability and opportunity to waive that standard, it might be beneficial to do so. He said the Planning Board might not have the right tools to do its job. He said there are 3-members of the Board of Appeals that think the Comprehensive Plan is too vague.

Mr. Bragdon said the Comprehensive Plan is vague, but there is a section that says gravel extraction is permitted in the proposed zone. He said the town has enacted a gravel ordinance. He asked how the Planning Board could use that provision of the Comprehensive Plan to deny the permit.

Mr. Fowler said he was in attendance at the Planning Board meeting when the board turned down plans from other contractors (MacQuinn, Gott) based on what the land

would look like after mining. He said it has come down to the point that a person cannot meet the review criteria. He said the Comprehensive Plan is too vague, and one cannot meet the criteria unless one doesn't touch their land.

Mr. Holt asked if it was going to be the position of the Board of Appeals that the Comprehensive Plan ought not to be used because it is too vague. Mr. Fowler said it's all a matter of personal opinion. Mr. Tadema-Wielandt said that the Planning Board has gone against Mr. Fowler's vision, and now he doesn't like it. He said perhaps Mr. Fowler should have pursued amendments to the ordinance.

Mr. Crotteau said he has a different view on the vagueness issue. He said the problem is that the ordinance cannot be specific enough to cover everything. He said there are general guidelines the Planning Board applies to each case. He said the Planning Board has an extremely difficult job and he's not sure when they are talking about the character of the town whether an ordinance can be more specific. He said he voted the way he did because the Planning Board considered what they needed to, and this criterion applied only to this case. Mr. Fenton said he did not mean to cast any aspersions on the Planning Board. He said they do fantastic work and he appreciates all the hours. He said his view is that the Planning Board could use the waiver.

Mr. Wuorinen said he would echo the comments of Mr. Crotteau. He said the Planning Board's job is to consider the application of the ordinances. He said if a decision is made to have the Planning Board reconsider its' decision, they would likely come to the same conclusion. A discussion followed on that Board of Appeals options were. Mr. Holt said he feared if the decision is remanded to the Planning Board without any guidance, the Planning Board would make the same decision. He said he read a lot of Appeals Board material and believes the Appeals Board can instruct the Planning Board to waive the review criterion J-16, and the Planning Board would be compelled to do that unless a court rules otherwise.

Mr. Fenton said he would specify that his motion previously stated that the Board of Appeals rules that review criterion J-16 not be considered by the Planning Board. **Vote in favor was 3-2, Crotteau and Wuorinen opposed.**

The chairmanship was passed back to Mr. Fenton.

Mr. Crotteau said he was troubled by the tree cutting that has taken place on the lot by Gott. He said it's not bad, but it seems inappropriate when the permit requires more of a tree buffer. He asked whether the potential conditions of the permit application could be met after the tree removal. Mr. Fowler said he understood the 50-foot buffer was supposed to be natural. He said the proposed berm with the planted trees should be outside the 50-foot buffer area, and with the required slope, the pit would be set back 125-feet from the property line.

Mr. Holt said the Planning Board conducted a site visit after receiving the original proposal, and noted that because of the old growth wood and thin topsoil, the wind would likely blow the trees over once the proposed pit area was scarified. He said the cutting plan and berm system were approved by the Planning Board. He said the issue

for him is that the original pit requires a 50-foot setback, though Gott could now reduce that to 10-feet. He said if that buffer is clear cut, it would be in violation of the permit. He said he has not asked the Code Enforcement Officer to visit. A brief discussion followed in regard to the buffer issue. Mr. Holt said it was a code enforcement matter.

Mr. Fenton said if the permits were approved, Gott would be compelled to do what the Planning Board told them, but if the permit were denied, they could do what they want in regard to cutting. Mr. Holt said the actions are a demonstration of character. A brief discussion followed.

Mr. Bragdon asked about the advice from Maine Municipal Association on the Gravel Application appeal being held de novo instead of administratively. Mr. Holt said unless an ordinance stipulates the method for processing an appeal, a de novo hearing is the default method. He said the gravel ordinance has a different appeal process than the Site Plan Review Ordinance. He said the provisions in those two ordinances conflict with some of the other ordinances. He said which rules supersede one another could be the basis for a test. Mr. Crotteau said there is an option for an administrative appeal. Mr. Fenton said everyone agreed to have an administrative appeal on this matter.

Findings and Conclusions – The board orally read the drafted findings and conclusions while Secretary Marckoon edited the document to reflect the actions of this evening. A lengthy discussion followed in regard to the appeal period, and whether it was 45-days from this evening, or is reduced to 15-days because of the reconsideration of the vote from last week.

The final draft of the Findings and Fact and Conclusions of law was signed by the five Board of Appeals members and made a part of the record following a motion from Mr. Fowler and a 2nd from Mr. Crotteau and a **unanimous vote in favor**.

There being no further business the meeting adjourned at 8:47 PM

Respectfully submitted,

Stuart Marckoon, Secretary
Lamoine Board of Appeals